



STATE OF INDIANA

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August 3, 2011

Ms. Debbie Ottinger
Lebanon Clerk Treasurer
Via email: dottinger@cityoflebanon.org

Re: *Informal Inquiry 11-INF-38; City of Lebanon*

Dear Ms. Ottinger:

This is in response to your informal inquiry regarding the City of Lebanon ("City"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry. My opinion is based on applicable provisions of the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.*

Your inquiry seeks advice regarding a records request the City received from Kramer Companies ("Kramer") for information regarding the City's new public safety building. Duke Realty ("Duke") contracted with the City to complete construction of the building. Pursuant to the terms of the contract between the City and Duke, Duke was required to retain liability insurance covering Duke in connection with any incidents that occurred during construction. The City was required to reimburse Duke for the cost of the coverage pursuant to the terms of the contract. The City has maintained their general liability insurance coverage, separate from Duke's coverage, which is retained regardless of any construction project and not the subject of Kramer's request. Duke contracted with Willis of Maryland, Inc. ("Willis") to provide liability coverage for Duke in connection with the construction of the building. Duke has submitted to the City a copy of the Certificate of Liability, that provided an overview of the coverage, including terms, policy numbers, and limits.

The City received a public records request from Kramer for a copy of the actual insurance policy held by Duke in connection with the construction of the new building. The City has never retained a copy of Duke's insurance policy issued by Willis. Upon receiving Kramer's request, the City provided a copy of the Certificate of Liability to Kramer. The City thereafter requested a copy of the insurance policy from Duke. Having already provided to the City a copy of the Certificate of Liability, Duke declined to provide a copy of the insurance policy, citing it as privileged. I do not have a copy of the contract between the City and Duke, so I am not aware of any requirement of Duke to provide a copy of the actual insurance policy to the City.

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” I.C. § 5-14-3-1. The City is a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the City’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

A “public record” means any writing, paper, report, study, map, photograph, book, card, tape recording or other material that is created, received, retained, maintained or filed by or with a public agency. I.C. § 5-14-3-2(m). The Indiana Court of Appeals has further added to the definition records created for or on behalf of a public agency. *Knightstown Banner v. Town of Knightstown*, 838 N.E.2d 1127 (Ind. Ct. App. 2005).

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Op. of the Public Access Counselor 01-FC-61*. APRA does not require public agencies to create records to satisfy a request. *Op. of the Public Access Counselor 10-FC-56*; see also *Op. of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”).

It can not be argued that the City created the insurance policy between Duke and Willis. Further, the City has provided it has never retained a copy of Duke’s insurance policy. Duke’s insurance policy was not created for or on behalf of the City, as the policy was created for Duke by Willis, and the policy only provides liability coverage to Duke. The City was not involved in the process of selecting the insurance company responsible for providing coverage to Duke. Thus, if the City has not received or retained a copy of the insurance policy, then it did not violate APRA in response to Kramer’s request.

As noted earlier, I am not aware of any provision in the contract between the City and Duke that required Duke to provide a copy of the insurance policy to the City. The State Board of Accounts would be able to determine whether the City was required to retain a copy of the insurance policy since the City reimbursed Duke for the cost of the coverage. If the City had ever retained a copy in their possession, then unless the record was excepted from disclosure as confidential or otherwise nondisclosable under the APRA, the City would be required to make a copy available to Kramer. The APRA requires public agencies to maintain and preserve public records in accordance with applicable retention schedules. See I.C. § 5-14-3-4(e).

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor